STATE OF RHODE ISLAND

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: June 29, 2023)

RHODE ISLAND BOARD OF REGENTS/ DEPARTMENT OF EDUCATION, *Plaintiff,*	:	
v.	:	**C.A. No. PC-2015-5683**
RHODE ISLAND STATE LABOR RELATIONS BOARD by and through its Chairman, WALTER J. LANNI, and its Members, MARCIA B. REBACK, SCOTT G. DUHAMEL, ARONDA R. KIRBY, HARRY F. WINTHROP, ALBERTO APONTE CARDONA, and FRANK J. MONTANARO, and RIDE LEGAL COUNSEL/HEARING OFFICER PROFESSIONAL UNION, *Defendants.*	:	
	:	*Consolidated With*
RHODE ISLAND BOARD OF REGENTS) /DEPARTMENT OF EDUCATION, *Plaintiff/Appellant,*	:	
v.	:	**C.A. No. PC-2014-2730**
RHODE ISLAND STATE LABOR RELATIONS BOARD by and through its Chairman, WALTER J. LANNI, and its Members, MARCIA B. REBACK, GERALD S. GOLDSTEIN, ELIZABETH S. DOLAN, BRUCE A. WOLPERT, FRANK J. MONTANARO, and SCOTT G. DUHAMEL; and RIDE LEGAL COUNSEL/HEARING OFFICER PROFESSIONAL UNION, *Defendants/Appellees*	:	
ANTHONY F. COTTONE, ESQ. *Intervenor*.	:	

DECISION

TAFT-CARTER, J. The Rhode Island Board of Regents/Department of Education (RIDE or Appellant) seeks judicial review and reversal of an April 30, 2014 Decision and a December 2, 2015 Supplemental Decision on Remand issued by the Rhode Island State Labor Relations Board (the Board) in the matter of Rhode Island Board of Regents/Department of Education and RIDE Legal Counsel/Hearing Officer Professional Union (Union) (Case No. ULP EE-3729). This Court exercises jurisdiction over this matter pursuant to G.L. 1956 §§ 42-35-15 and 28-7-29(a).[1]

I

Facts and Travel

On November 9, 2012, Attorney Paul Pontarelli filed a petition on behalf of the Legal Counsel/Hearing Officers employed by RIDE, seeking certification of the RIDE Legal Counsel/Hearing Officer Professional Union (Union). (Compl. (2014 Compl.) ¶ 9, May 30, 2014.) The petition's proposed bargaining unit consisted of "[a]ll full-time Legal Counsel/Hearing Officer positions within the RI Board of Regents/Department of Education,"[2] excluding the "Chief Legal

[1] G.L. 1956 § 28-7-29(a) provides that

> "[a]ny person aggrieved by a final decision of the board . . . may obtain a review of the final decision or final order in the superior court of the county where the unfair labor practice in question was alleged to have been engaged in or where the person resides or transacts business, by filing in the superior court, within thirty (30) days after the final decision or final order is given by the board, a complaint requesting that the final decision or final order of the board be modified or set aside. If that court is on vacation or in recess, then the person may file to the superior court of any county adjoining the county where the unfair labor practice in question occurred or where the person resides or transacts business." G.L. 1956 § 28-7-29.

[2] The Rhode Island Board of Regents for Elementary and Secondary Education is the statutory predecessor to the Council on Elementary and Secondary Education. *See* G.L. 1956 §§ 16-60-1(c), 16-97-5.

Counsel and all other full-time positions within [RIDE]." (Pet. for Investigation of Controversies as to Representation 1, Nov. 9, 2012.) Appellant objected on the grounds that each Legal Counsel/Hearing Officer was in a confidential position and thus not eligible to participate in a collective bargaining unit. (2014 Compl. ¶ 10.)

A

Hearings Before the Board

On December 12, 2012, the Board conducted an informal hearing and found that the matter should proceed to a formal hearing. (Letter from Robyn H. Golden to Paul Pontarelli 1, Feb. 18, 2013.) The Board held formal hearings on May 9, 2013 and June 20, 2013. (2014 Compl. ¶ 23.)

1

Margaret Santiago's Testimony

Ms. Santiago testified as RIDE's Human Resources Manager. (Hr'g Tr. (May Tr.) 4:21-5:4, May 9, 2013.) Ms. Santiago had worked as RIDE's Human Resources Manager for three years and was responsible for handling labor relations at the Department of Education. *Id.* at 8:13-20. She testified that RIDE employed three Legal Counsel/Hearing Officers—Attorney Pontarelli, Attorney Kathleen Murray, and Attorney Forrest Avila. *Id.* at 6:9-15. The Legal Counsel/Hearing Officers were supervised by the Chief Legal Counsel, Attorney George Muksian. *Id.* at 6:22-7:13.

Ms. Santiago further testified to the general job description for Legal Counsel/Hearing Officers. *See id.* at 5:8-17. Legal Counsel/Hearing Officers are "responsible for representing and providing legal advice and other legal services to the Department of Education, providing information related to educational law to members of the education community, conducting hearings, and preparing written decisions resolving appeals." (Union's Ex. 1.) Legal Counsel/Hearing Officers work under the supervision of a manager. *See id.* Further, the job

description neither requires, nor prohibits, Legal Counsel/Hearing Officers from working on matters involving labor disputes. *See id.* In contrast, the Chief Legal Counsel "provide[s] legal counsel to the Commissioner of Education and representation of the Department in matters related to educational policy and law and *labor relations*." (Union's Ex. 2) (emphasis added).

Ms. Santiago next testified to her experience working on RIDE labor relations matters, confirming that the Chief Legal Counsel and Attorney David Abbott[3] assist her with contract negotiations. (May Tr. 11:9-24.) When dealing with grievances and arbitrations, only Attorney Muksian assisted Ms. Santiago. *Id.* at 11:25-12:10. Additionally, Ms. Santiago testified that the three Legal Counsel/Hearing Officers did not have access to confidential information related to RIDE's collective bargaining proposals. *Id.* at 12:11-21. She noted that the pay grade for Chief Legal Counsel is higher than the pay grade for Legal Counsel/Hearing Officers. *Id.* at 12:25-13:11.

Lastly, Ms. Santiago testified that Attorney Pontarelli has previously prepared a decision for the Commissioner of Education (the Commissioner) concerning the alleged wrongful termination of a Rhode Island School for the Deaf teacher and that he had represented RIDE in a wrongful discharge case filed by a William M. Davies, Jr. Career and Technical High School (Davies) teacher. (Hr'g Tr. (June Tr.) 105:8-108:17, 112:11, June 20, 2013.) Finally, Ms. Santiago testified that Attorney Avila served as the hearing officer for two grievances filed by the Rhode Island Department of Education Professional Employees Union, Local 2012 Rhode Island, RIFTAFT, AFL-CIO, Rhode Island Department of Elementary Secondary Education (Local 2012): one in 1992 and one in 1995. *Id.* at 109:9-20, 111:10-14; May Tr. 44:13-21.

[3] It is apparent from subsequent filings that Attorney David Abbott was the Deputy Commissioner/General Counsel at RIDE. *See* RIDE's Mem. Supp. Mot. to Remand, Ex. D (Abbott Aff.) ¶ 1, Mar. 31, 2016.) However, this fact was not established during the hearings.

Attorney Pontarelli's Testimony

Attorney Pontarelli testified that around 2011 he had a brief conversation with Attorney Muksian regarding an unfair labor practice charge filed against Commissioner Gist related to a memorandum she distributed to RIDE employees regarding the Central Falls School District (Central Falls). *Id.* at 20:11-21:18. Attorney Muksian asked Attorney Pontarelli about the six month limitations period for filing unfair labor practice charges and the necessity of informal hearings. *Id.* at 21:3-21. The conversation lasted approximately forty-five seconds to one minute and they spoke next to their legal assistant's printer. (June Tr. 86:14-87:1.)

Attorney Pontarelli then testified to his role in investigating and prosecuting teacher misconduct. (May Tr. 22:11-23:11, 24:6-26:17.) He acknowledged that he has served as a hearing officer in cases involving teacher misconduct. *Id.* at 23:1-11; June Tr. 87:23-25. However, he testified that he does not typically hear teacher discipline or termination cases in his capacity as a hearing officer. (May Tr. 22:6-23.) He explained that while his job description allows him to perform this work, he could not ethically do so because it would create a conflict with his role as an investigator and prosecutor of teacher misconduct. *Id.* at 24:19-25:13. Attorney Pontarelli testified that he investigates teacher misconduct at the Rhode Island School for the Deaf, in the Central Falls School District, and at Davies, but he denied that these schools are operated by RIDE. *Id.* at 26:5-22. He further recognized that he has heard appeals of teacher grievances from the Central Falls School District. *Id.* at 72:25-73:3. Attorney Pontarelli testified that for a decision to be effective it must be signed by the Commissioner. (June Tr. 114:21-115:10.) If the Commissioner does not sign the decision, the Commissioner is nevertheless responsible for issuing a decision under the statute. *Id.* at 115:10-14.

Attorney Pontarelli testified that he does not normally conduct RIDE employee grievance hearings although he had previously conducted two, each in the 1990s. (May Tr. 23:14-17.) Specifically, Attorney Pontarelli acknowledged that in 1996 he served as a hearing officer for a grievance filed by Local 2012, one of two unions that represent RIDE employees. *Id.* at 33:14-35:6. Additionally, in 1995, he was designated by the Commissioner of Education to conduct a hearing with regard to a grievance filed by Ms. Diana Crowley, Chairperson of Local 2012. *Id.* at 37:3-8; Board's Ex. 4 (Letter dated Sept. 5, 1995), at 2-3.

After reviewing his job description, Attorney Pontarelli recognized that he has provided legal opinions on a variety of subjects. (May Tr. 28:15-21.) One of Attorney Pontarelli's advisory opinions related to staffing policies at the Portsmouth School Department and how seniority in a Collective Bargaining Agreement relates to job promotion. *Id.* at 54:15-55:19. Attorney Pontarelli acknowledged that advisory opinions may be used in school districts throughout the state, but he testified that these opinions are non-binding. *Id.* at 56:25-57:6.

Attorney Pontarelli also recognized that there was no written limitation in his job description that would prevent him from appearing before the Board or the Human Rights Commission, but he testified that he does not perform labor relations work for RIDE. *Id.* at 31:1-33:7. He testified that labor relations work is performed by the Chief Legal Counsel. *Id.* at 32:1-8; 78:9-11. Since the Chief Legal Counsel position was created, Attorney Pontarelli attested that he has not had any involvement in RIDE's management or operations from a labor relations perspective. (June Tr. 85:15-86:3.) When Attorney Pontarelli's supervisor, Chief Legal Counsel Muksian, goes on vacation or sick leave, Attorney Pontarelli completes his work. (May Tr. 78:9-80:24.) However, even when Attorney Muksian has been absent from work, Attorney Pontarelli has not performed any labor relations work on his behalf. (June Tr. 86:4-13.) Attorney Pontarelli

also testified that he has on occasion performed lobbying and testified before the General Assembly. (May Tr. 58:5-20.) When performing these tasks, Attorney Pontarelli acknowledged that sometimes the topic was labor relations. *Id.* at 58:21-23.

Attorney Pontarelli further testified that his office is located in the same building as the offices of Higher Education. *Id.* at 58:24-59:14. Attorney Pontarelli was also aware that the Department of Higher Education and RIDE were merging pursuant to the July 2012 budget amendment and that there were other attorneys working at the Department of Higher Education. *Id.* at 60:3-9. Attorney Pontarelli testified that Ron Cavallaro is an attorney at the Department of Higher Education, but he does not know if Attorney Cavallaro serves as a Hearing Officer. *Id.* at 47:20-48:6. He added that Attorney Anne Marie Coleman and Attorney Saccoccio[4] are also attorneys at the Department of Higher Education. *Id.* at 48:7-20.

Regarding the cases in which he has represented RIDE or the Commissioner, Attorney Pontarelli testified that he represented the Department of Education in the matter of a terminated Davies teacher. *Id.* at 75:20-76:16. Attorney Pontarelli further testified that he entered an appearance in proceedings before both the Superior Court and the Supreme Court in the 2010 case of East Providence School Committee versus East Providence Education Association. *Id.* at 77:13-18. He testified that RIDE did not actively participate in that matter. *Id.* at 77:19-24. Attorney Pontarelli also entered an appearance in a 2012 case involving the North Providence AFT versus the Regents and the North Providence School Committee, where he represented the Commissioner. *Id.* at 77:25-78:8. Lastly, Attorney Pontarelli acknowledged that he has filed a grievance against RIDE. (June Tr. 88:4-10.) Former Commissioner Gist heard and denied his grievance. *Id.* at 90:11-17; Board's Ex. 6 (Grievance Decision), at 4.

[4] Attorney Saccoccio's first name does not appear in the record.

3

Attorney Murray's Testimony

Attorney Murray served as a Hearing Officer at RIDE and, in that capacity, she heard teacher termination cases. (June Tr. 91:9-14.) Attorney Murray testified that the teacher termination cases could concern any of the schools in Rhode Island, including the Rhode Island School for the Deaf, Davies, and Central Falls as long as the "governing board of the teacher's employer had heard the matter and rendered a . . . final written decision." *Id.* at 91:15-18, 97:4-9. After the governing board issues a decision, the case goes to the Commissioner for a hearing for which Attorney Murray is typically designated the hearing officer. *Id.* at 97:10-13. Attorney Murray testified that when serving as a Hearing Officer, she does so as the Commissioner's designee pursuant to the two statutes that give the Commissioner jurisdiction to hear such appeals. *Id.* at 98:5-11. When asked if she was "representing" the Commissioner, Attorney Murray replied:

> "That is a very complex issue because in the role of the hearing officer and in adjudicating cases, my approach has been that the hearing officer needs to base the decision on the record created in the hearing and the law applied to that factual record, and therefore I am unable to consult with the Commissioner or any staff of the Commissioner's office or anyone at RIDE in processing a matter for a decision. Unfortunately, that's just the approach that I believe I have to take, and sometimes it does rub up against the notion that I, quote, 'Represent the Commissioner or that I represent RIDE.' I think the adjudicator function isolates the hearing officer and it has an isolated need through my own choice." *Id.* at 98:15-99:10.

Attorney Murray explained that the information she considers in a case must either be produced as evidence at the hearing or by stipulation of the parties' attorneys. *Id.* at 99:22-100:3. She also testified that when drafting decisions for teacher discipline cases, she might ask the attorneys for briefs, and if they are inadequate, she will do her own legal research. *Id.* at 100:20-

23. Attorney Murray testified that sometimes her decision may cause displeasure at RIDE, but the Commissioner almost always signs the decision. *Id.* at 101:3-6.

4

Attorney Muksian's Testimony

Attorney Muksian testified that he was currently serving as the Chief Legal Counsel to RIDE and, in that capacity, his duties and responsibilities were to oversee the operations of the legal department and handle matters he assigned to himself and to the department's attorneys. *Id.* at 116:5-14. Attorney Muksian also testified that he was responsible for handling RIDE employee grievance and other labor and employment issues on behalf of RIDE. *Id.* at 116:19-22. When taking time off for illness or vacation, Attorney Muksian confirmed that the Legal Counsel/Hearing Officers handle his matters in his absence. *Id.* at 116:23-117:9

B

The Parties' Arguments Before the Board

Following the hearings, Appellant and the Union submitted post-hearing briefs to the Board. (2014 Compl. ¶ 24.) Appellant advanced three general arguments. *See generally*, RIDE's Post-Hr'g Br., Sept. 4, 2013. First, Appellant argued that the appropriate bargaining unit consists of the three Legal Counsel/Hearing Officers who worked at RIDE as well as the two Legal Counsel/Hearing Officers employed at the Rhode Island Department of Higher Education. *Id.* at 2 (citing H.R. 7323, 2012 Gen. Assem., Jan. Sess. (R.I. 2012)). Consequently, because the Department of Higher Education Legal Counsel/Hearing Officers had access to confidential information concerning RIDE labor relations, Appellant argued that the bargaining unit contained confidential employees. *Id.* at 8.

Second, Appellant argued that the Legal Counsel/Hearing Officers qualified as the first category of confidential under the labor nexus test because they assisted and acted in a confidential capacity to Attorney Muksian and the Commissioner. *Id.* at 8. Appellant contended that both Attorney Muksian and the Commissioner had an ongoing responsibility for RIDE's labor relations. *Id.* Therefore, because RIDE Legal Counsel/Hearing Officers acted in an advisory capacity to Attorney Muksian and counseled the Commissioner, they were confidential employees. *Id.* at 9. More specifically, Appellant contended that the Legal Counsel/Hearing Officers assisted and acted in a confidential capacity to Attorney Muksian because Attorney Pontarelli provided him with advice concerning an unfair labor practice claim and because the Legal Counsel/Hearing Officers are responsible for handling labor relations matters when Attorney Muksian is absent. *Id.* at 6-7, 9. Appellant also contended that Legal Counsel/Hearing Officers assisted and acted in a confidential capacity to the Commissioner because they counseled the Commissioner regarding labor relations at allegedly RIDE-operated schools. *Id.* at 3, 9-10 (citing to G.L. 1956 §§ 16-45-6, 16-26-3.1(h) and *In re City of Central Falls*, 468 B.R. 36 (Bankr. D.R.I. 2012)). Third, Appellant argued that the Legal Counsel/Hearing Officers were confidential employees under the second category of the labor nexus test because they regularly had access to confidential information concerning labor relations. (RIDE Post-Hr'g Br. 8.)

In response, the Union argued that: (1) the evidence viewed showed that RIDE Legal Counsel/Hearing Officers were not confidential; (2) there was no evidence in the record to show that Davies, the Rhode Island School for the Deaf, and Central Falls were operated by RIDE; and (3) RIDE failed to prove that the proposed bargaining unit was inappropriate due to its exclusion of the Department of Higher Education Legal Counsel/Hearing Officers because there was no evidence showing that those employees' earnings, benefits, hours, duties, qualifications, and skills

are similar to the RIDE Legal Counsel/Hearing Officers such that they should have been included in the bargaining unit. (Union's Br. (Union's Post-Hr'g Br.) 2-5, Sept. 4, 2013.)

C

The 2014 Board Decision

On April 30, 2014, the Board reviewed and adopted the Decision and Direction of Election (2014 Decision), which ordered that a representation election be held amongst all the Legal Counsel/Hearing Officers employed by RIDE. (2014 Compl. ¶ 25.) It its Decision, the Board provided a factual summary of the case before it. (2014 Decision 1-5.) The Board noted that the proposed bargaining unit consisted of three Legal Counsel/Hearing Officer positions at RIDE which were occupied by Attorneys Pontarelli, Murray, and Avila[5] at the time of the hearing. *Id.* at 1. The Board further noted that signature cards had been submitted with the petition for representation and verified by the Board's staff. *Id.* The Board then identified and summarized the relevant evidence including testimony provided by Ms. Santiago and Attorneys Pontarelli, Murray, and Muksian. *See* 2014 Decision 2-5.

After summarizing the parties' arguments, the Board discussed *Barrington School Committee v. Rhode Island State Labor Relations Board*, 608 A.2d 1126 (R.I. 1992), in which our Supreme Court established the confidential employee exclusion for collective bargaining. (2014 Decision 6.) The Board noted that the issue of whether attorneys may engage in collective bargaining was an issue of first impression for the Board, but it acknowledged that "public sector attorneys in many states have been permitted to join labor organizations." *Id.* The Board then analyzed this case under the labor nexus test, as enunciated in *NLRB v. Hendricks County Rural*

[5] The Board noted Attorney Avila was scheduled to retire in the summer of 2013. (2014 Decision 1.)

Electric Membership Corp., 454 U.S. 170, 189 (1981). *See* 2014 Decision 6. In doing so, the Board considered the following:

> 1) Whether the Legal Counsel/Hearing Officer position in the proposed bargaining unit assist and act in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations. *Id.* at 7-9;
> 2) Whether the Legal Counsel/Hearing Officer position in the proposed bargaining unit regularly have access to confidential information concerning anticipated changes which may result from collective bargaining negotiations. *Id.* at 9-10; and
> 3) Whether this case presented the appropriate factual circumstances that would warrant an expansion of the labor nexus test in determining confidentiality of employees. *Id.* at 10-12.

First, the Board found that the Legal Counsel/Hearing Officers were not confidential employees under the first category of the labor nexus test. *Id.* at 9. The Board found that based on the Chief Legal Counsel job description and Ms. Santiago's testimony, Attorney Muksian was a supervisory employee responsible for developing labor policy. *Id.* at 7. Nevertheless, the Board concluded that RIDE Legal Counsel/Hearing Officers did not assist and act in a confidential capacity to Attorney Muksian because "[t]here was simply no evidence in the record to suggest that the Hearing Officers act in a confidential capacity to any other employee of the department as it pertains to the formulation, determination or effectuate management policies in the field of labor relations." *Id.* at 8-9.

Next, the Board concluded that the RIDE Legal Counsel/Hearing Officers did not qualify as confidential under the second category of the labor nexus test. *Id.* at 10. The Board noted that according to the unrebutted testimony of Ms. Santiago, RIDE Legal Counsel/Hearing Officers do not have access to confidential information pertaining to collective bargaining and that the only evidence to show that Attorney Pontarelli had access to confidential information relating to labor relations was a "casual 'water cooler' type interaction between [Attorney] Muksian and [Attorney]

Pontarelli[.]" *Id.* at 10. Therefore, the Board found that this interaction was not enough to classify the RIDE Legal Counsel/Hearing Officers as confidential because "such a casual, isolated incident [was not] . . . evidence of 'regular and considerable access to such confidential information as a result of his or her job duties[.]'" *Id.* (quoting *Barrington School Committee*, 608 A.2d at 1137).

Finally, the Board held the present case did not present sufficient facts to warrant an expansion of the labor nexus test. *Id.* at 12. The Board first noted that the *Barrington School Committee* Court recognized that an expansion of the labor nexus test may be necessary to maintain the adversary system of labor relations. *Id.* at 10-11. The Board thus recognized that an expansion of the labor nexus test may be warranted to exclude employees who "'are privy to the most sensitive details of management decision making, [and] who work closely with managers on a personal and daily basis,'" even if they do not handle labor relations. *Id.* at 11 (quoting *Barrington School Committee,* 608 A.2d at 1137 n.8). Under that test, the Board first addressed Appellant's argument that the Department of Higher Education Legal Counsel/Hearing Officers should be included in the bargaining unit. *Id.* The Board took judicial notice of the fact that the Department of Higher Education attorneys regularly appeared before the Board on behalf of RIDE management. *Id.* However, because Appellant failed to present evidence that the Department of Higher Education Legal Counsel/Hearing Officers should be included in the bargaining unit, the Board concluded that it could not make factual findings on that issue. *Id.*

The Board next considered whether the Legal Counsel/Hearing Officers' role as hearing officers in RIDE employee grievances in the 1990s and their then-current role as hearing officers in teacher discipline, certification, and termination cases presented sufficient facts to warrant an expansion of the labor nexus test. *See id.* at 11-12. The Board noted that RIDE Legal Counsel/Hearing Officers used to act as hearing officers for RIDE employee grievances in the

1990s. *Id.* at 12. The Board further recognized that RIDE Legal Counsel/Hearing Officers were designated by the Commissioner to hear and decide appeals from decisions pertaining to teacher discipline, certification, and termination. *Id.* Nevertheless, the Board concluded that RIDE Legal Counsel were not "aligned with management" because RIDE Legal Counsel/Hearing Officers acted as "neutrals" in their capacity as hearing officers. *Id.* Therefore, because RIDE Legal Counsel/Hearing Officers were acting in a quasi-judicial capacity, they could not engage in direct communications with management concerning the subject matter of those hearings and thus did not become privy to the "most sensitive details of management decision making." *Id.* Therefore, the Board concluded that the facts of this case did not justify expanding the labor nexus test. *Id.*

The Board then made fifteen findings of fact. *Id.* at 12-15. It found that: (1) RIDE was an "employer" under the Rhode Island State Labor Relations Act (the Labor Relations Act); (2) the Union was a "'Labor Organization' [under the Labor Relations] Act"; (3) the proposed bargaining unit consisted of the three Legal Counsel/Hearing Officer positions within RIDE which were occupied by Attorneys Pontarelli, Murray, and Avila; (4) the position of Legal Counsel/Hearing Officer was in the non-classified service; (5) the duties and responsibilities of RIDE Legal Counsel/Hearing Officers included the duties listed in the job description; (6) the job description for the Chief Legal Counsel included the responsibility to provide counsel and representation in matters related to educational policy and labor relations; (7) the job description for Chief Legal Counsel required them to have "knowledge of the methods, practices and procedures of government law, with an emphasis on education law, labor and employment law"; (8) Ms. Santiago worked with Attorneys Muksian, Rinaldi, Whelan, and Cavallaro on RIDE labor relations matters, but not with the RIDE Legal Counsel/Hearing Officers; (9) Ms. Santiago worked with Attorneys Muksian or Abbott when dealing with contracts, collective bargaining, and employee grievances;

(10) the RIDE Legal Counsel/Hearing Officers do not have access to confidential information pertaining to collective bargaining; (11) Attorney Pontarelli does not normally conduct grievance hearings, but he did in the 1990s; (12) Attorney Pontarelli sometimes lobbies at the General Assembly on the topic of labor relations but this information is public, not confidential; (13) Attorney Pontarelli occasionally litigates on behalf of RIDE; (14) Attorney Pontarelli has not been involved in labor relations matters within RIDE since the creation of the Chief Legal Counsel position in 1998; and (15) "[n]o evidence was entered into the record concerning the job descriptions of Attorney[s]" Coleman or Cavallaro other than that they were employed by the Board of Regents and previously appeared before the Board. *Id.* at 12-15.

Based upon the findings of fact, the Board made two conclusions of law. *Id.* at 15. First, the Board concluded the position of Legal Counsel/Hearing Officer was not a confidential position for purposes of exclusion from collective bargaining. *Id.* Second, the Board concluded that an expansion of the labor nexus test or deviation therefrom was not warranted by the facts presented in the matter before it. *Id.* Accordingly, the Board issued its Direction of Election, and:

> "DIRECTED that an election by secret ballot shall be conducted within thirty (30) day hereafter, under the supervision of the Board, or its Agents, at a time, place and during hours to be fixed by the Board, among the Legal Counsel/Hearing Officers employed by the State of Rhode Island, Department of Education who were employed on November 9, 2012, to determine whether they wish to be represented, for the purposes of collective bargaining . . . by RIDE Legal Counsel . . . Professional Union, or by no labor organization." *Id.*

Thereafter, the Union and Appellant met informally on May 7, 2014 and agreed upon the terms of the election, including that "[t]he eligibility list of employees shall consist of all employees within the said appropriate unit who were employed on November 9, 2012[.]" (Am. Directed Election Agreement ¶ 5.) At the election on May 21, 2014, the RIDE Legal

Counsel/Hearing Officers voted in favor of representation by a vote of two out of two. (Report Upon Secret Ballot 1.) On May 28, 2014, the Board certified the RIDE Legal Counsel/Hearing Officer Professional Union as the exclusive representative for the bargaining unit. (Certification of Representatives 1.)

D

The First Appeal

On May 30, 2014, Appellant commenced its first administrative appeal by filing a Complaint in Superior Court. *See generally* 2014 Compl. The 2014 Complaint asserted one count: an appeal of the 2014 Decision pursuant to § 42-35-15. (2014 Compl. ¶¶ 32-38.) On June 18, 2014, the Union filed its Answer. *See* PC-2014-2730 Docket. Appellant subsequently filed a Motion for a Stay of the Board's Decision and Order Pending Appeal. (RIDE's Mot. for Stay of Board's Decision & Order Pending Appeal 1, July 8, 2014.) This Court held two hearings on the Motion to Stay, and ultimately entered a Consent Order whereby the parties agreed to a stay pending this Court's decision. *See* PC-2014-2730 Docket; Consent Order, Sept. 4, 2014 (Procaccini, J.). The parties thereafter exchanged briefs. *See generally*, RIDE's Mem. Supp. Appeal (RIDE's Sept. 2014 Mem.), Sept. 29, 2014; Def. Union's Mem. (Union's Nov. 2014 Mem.), Nov. 17, 2014; Br. of Resp't Board, Nov. 17, 2014; RIDE's Reply Mem. Supp. Appeal, Dec. 15, 2014.

On appeal, Appellant presented a new argument: that the Legal Counsel/Hearing Officers are excludable from collective bargaining due to their status as managerial employees. (RIDE's Sept. 2014 Mem. 13-16.) Additionally, on November 25, 2014, Attorney Anthony Cottone, a RIDE Legal Counsel/Hearing Officer, filed a motion to intervene and remand. (RIDE's Reply Mem. Supp. Appeal 9.) Subsequently, Appellant filed a reply brief arguing that this Court should remand the case to hear "new evidence" from Attorney Cottone and Commissioner Deborah A.

Gist. *Id.* at 8-9. Specifically, Appellant requested that this Court remand so the Board could consider "new evidence" presented by Attorney Cottone regarding his performance of the position since he was hired in September of 2013. *Id.* at 9. Appellant further requested that the Court remand so that the Board could consider evidence from Commissioner Gist regarding how she had sought Attorney Cottone's counsel with respect to matters involving organized labor after he was hired. *Id.* Attorney Cottone individually, and in his capacity as RIDE Legal Counsel/Hearing Officer, subsequently filed a Motion to Remand which he supported with an Amended Affidavit and fifteen additional exhibits. *See* Mot. to Remand 1, Jan. 23, 2015; Am. Aff. of Att'y Cottone Supp. Mot. to Remand (Am. Cottone Aff.), Jan. 23, 2015. Attorney Cottone's affidavit further described his performance of the position. (Am. Cottone Aff. ¶¶ 9-11.)

The Board and the Union filed objections to Attorney Cottone's motion to intervene and to remand, as well as to Attorney Cottone's subsequent motion to remand. *See* Obj. to Mot. to Intervene & Remand (Union's Dec. 2014 Obj.) 1, Dec. 24, 2014; Mem. Supp. Obj. to Mot. to Intervene & Remand 1, Jan. 4, 2015; Revised Mem. Supp. Obj. to Renewed Mot. to Remand 1, Jan. 30, 2015; Resp. to Mots. to Remand 1, Jan. 30, 2015. Nevertheless, this Court granted Attorney Cottone's motion to intervene on February 5, 2015. *See* Order Granting Mot. to Intervene and Passing Mot. to Remand 1, Feb. 5, 2015 (Licht, J.). The Court then granted Appellant and Attorney Cottone's motion to remand on June 12, 2015. (Order Granting Mot. to Remand 1, June 12, 2015 (Van Couyghen, J.).) On remand, the Court ordered the Board to:

> "(a) reconsider whether the Legal Counsel/Hearing Officer position at RIDE should have been deemed managerial, and thus exempt from collective bargaining, at the time the Union's petition was filed with the [Board]; and
> "(b) determine, in its discretion: (i) if the parties should be permitted to introduce additional evidence on the issue; and (ii) if so, what additional evidence should be admitted." *Id.* at 2.

E

The Board's Supplemental Decision on Remand

On remand, the Board conducted an open meeting pursuant to the Open Meetings Act on June 25, 2015. (Stipulation ¶ 1, Feb. 15, 2023.) During this meeting, the Board went into executive session to discuss the pending litigation, specifically, the remand order. *Id.* The Board discussed the parameters of the remand order with legal counsel, and a motion was made and seconded that the position of RIDE Legal Counsel/Hearing Officers "did not meet the criteria of managerial; that there was sufficient evidence to make that determination; and that the parties would not be permitted to enter any additional evidence or submit briefs on the matter." *Id.* ¶ 2. All members present voted in favor of the motion. *Id.*

On December 2, 2015, the Board issued its Supplemental Decision on Remand (2015 Suppl. Decision). *Id.* ¶ 3. In the 2015 Supplemental Decision, the Board summarized the facts and the Court Order Granting the Motion to Remand. *See* 2015 Suppl. Decision 1. The Board first addressed the issue of whether additional evidence should be admitted. *Id.* at 1. The Board noted that prior to the 2015 Supplemental Decision, the evidence in the record consisted of two Union exhibits, eleven RIDE exhibits, and extensive testimony. *Id.* at 1-2. The Board summarized the testimonies given at the May 2013 and June 2013 hearings and concluded that "the examination was sufficiently thorough and the record adequate for an examination on the duties and responsibilities of the position and the question of whether or not the Legal Counsel/Hearing Officers were excludable from collective bargaining . . . as managerial." *Id.* at 2. The Board further found that although there has been a suggestion that Attorney Cottone's role as a RIDE Legal Counsel/Hearing Officer had expanded the position, "[s]uch [an] evolution of a position, months and years after a petition has been filed is not relevant to the conditions that existed at the time the

petition was filed." *Id.* at 2 n.2. Accordingly, the Board declined to reopen the record for additional evidence but considered and incorporated by reference the written arguments that had been filed in the Superior Court proceedings to date. *Id.* The Board also took judicial notice of a case cited by Appellants, *American Federation of State, County and Municipal Employees (AFSCME), Council 31 v. Illinois Labor Relations Board*, 17 N.E.3d 698 (Ill. App. Ct. 2014) (*American Federation of State*). *Id.*

In defining managerial employees, the Board turned to *NLRB v. Yeshiva University,* 444 U.S. 672, 686 (1980) for guidance. (2015 Suppl. Decision 2.) The Board highlighted the Supreme Court's reasoning in *Yeshiva University* that:

> "'The controlling consideration in th[e] case is that the faculty of Yeshiva University exercise authority which, in any other context, unquestionably would be managerial. Their authority in academic matters is absolute. They decide what courses will be offered, when they will be scheduled, and to whom they will be taught. They debate and determine teaching methods, grading policies, and matriculation standards. They effectively decide which students will be admitted, retained, and graduated. On occasion, their views have determined the size of the student body, the tuition to be charged, and the location of a school. When one considers the function of a university, it is difficult to imagine decisions more managerial than these. To the extent the industrial analogy applies, the faculty determines within each school the product to be produced, the terms upon which it will be offered, and the customers who will be served.'" *Id.* at 3 (quoting *Yeshiva University*, 444 U.S. at 686).

The Board highlighted, however, that the *Yeshiva University* Court clarified that its decision should not be interpreted as applying to all professional occupations. *Id.* at 3 (internal quotations omitted). The Board next noted that our Supreme Court adopted the *Yeshiva University* definition of managerial employee, defining them as employees "who 'formulate and effectuate management policies by expressing and making operative the decisions of their employers[,]' . . . [and who] exercise discretion within or even independently of established employer policy and [are] aligned

with management" *Id.* at 3 (quoting *Fraternal Order of Police, Westerly Lodge No. 10 v. Town of Westerly*, 659 A.2d 1104, 1108 (R.I. 1995) (citing *State v. Local No. 2883, American Federation of State, County and Municipal Employees*, 463 A.2d 186, 190 (R.I. 1983)).

The Board then discussed Appellant's reliance on *American Federation of State*. (2015 Suppl. Decision 4.) The Board explained that in *American Federation of State*, the Illinois Labor Board determined that Administrative Law Judges (ALJ) who worked for the Illinois Commerce Commission were managerial employees because the Commission's policies in utility regulation were directly effectuated through the ALJ's recommended orders, and such orders were almost always adopted by the commissioners. *Id.* at 4. The Board disagreed with Appellant's contention that *American Federation of State* was analogous, stating:

> "[T]here is no mention anywhere [in the RIDE Legal Counsel/Hearing Officer job description] of a requirement for drafting policies, effectuating policies, developing a budget, or assuring that the department or agency runs effectively. Likewise, there is no direction on the job description or evidence in the record that the Legal Counsel Hearing Officers direct the governmental enterprise of RIDE in a hands-on way or that they possess the authority to broadly affect its mission or fundamental methods." *Id.* at 5.

The Board found that the "only similarity between the [*American Federation of State*] case . . . and the within matter is the fact that in each case the written decisions are almost always accepted by the superior employee." *Id.* However, the Board noted that:

> "The significant differentiating factor . . . is that in the case of the [ALJs in *American Federation of State*], they spend 90% of their time hearing cases and writing decision[s] and are considered the 'whole game', because these decisions *are the main avenues by which the utility Commissioners carry out their statutory duties.* In the case of the Legal Counsel/Hearing Officers, their role in hearing teacher discipline and termination disputes and other matters appealed to the Commissioner's office from decisions issued by local school committees, in no way could be described as the 'whole game' of the agency." *Id.* at 5-6.

In sum, the Board found that the matters the Hearing Officers hear and decide are but one small piece of RIDE. *Id.* at 6. The Board concluded that most of the RIDE Legal Counsel/Hearing Officer's job duties "are common typical task[s] performed by any attorney for a client—providing legal opinions, providing legal representation, interpreting and keeping abreast of law, and advising others accordingly and preparing advisory opinions for review." *Id.* The Board thus found that the duties performed by the Legal Counsel/Hearing Officers do not require them to be "aligned with management." *Id.* The Board made ten supplemental findings of fact, finding:

> "1) The position of Chief Legal Counsel, not the Hearing Officer/Legal Counsel, is charged with managerial duty of formulating or effectuating policy by the duty to 'ensure that the laws and regulations relating to education are consistent [with] the Department's central role as an advocate for children.
> "2) The position of Chief Legal Counsel, not the Hearing Officer/Legal Counsel, is charged with the managerial duty to advocate for changes in policies, laws, rules and regulations that are inconsistent with the effective and efficient management of public schools.
> "3) The position of Chief Legal Counsel, not the Hearing Officer/Legal Counsel, is charged with the managerial requirement to provide legal counsel to the Department in matters related to education policy and law and labor relations.
> "4) The position of Chief Legal Counsel, not the Hearing Officer/Legal Counsel, is charged with the managerial task of ensuring that the Commissioner is supported in his/her legally authorized role to uphold the laws relating to the education of children.
> "5) The position of Chief Legal Counsel, not the Hearing Officer/Legal Counsel, is charged with the managerial function of being closely aligned with management by representing the Commissioner in hearings, trials, public forums and meetings.
> "6) The position of Chief Legal Counsel, not the Hearing Officer/Legal Counsel, has the managerial duty to ensure that the labor relations function of the Department is carried out in a manner that reflects the core principles of shared responsibility, commitment to worker development and professional responsibility.
> "7) The duties of the Hearing Officer/Legal Counsel are a very small element of the statutory duties set forth on Title 16 and do not come close to the description of "whole game" in the Illinois Commerce

> case because they do not issue decisions affecting every type of matter that comes within RIDE's statutory responsibilities.
> "8) The position of Hearing Officer/Legal Counsel is charged with the responsibility to 'review and advise with respect to legislation, rules and regulations developed by outside parties and related to education.' The position of Hearing Officer/Legal Counsel is not charged with the managerial task of creating or writing legislation, rules or regulations, but rather only with assisting appropriate staff in doing so.
> "9) The position of Legal Counsel/Hearing Officer requires only three (3) years of legal experience whereas the managerial position of Chief Legal Counsel requires considerable experience in a responsible capacity involving public sector law involving education employment, labor and child advocacy.
> "10) Legal Counsel/Hearing Officer positions function as lower-level staff attorneys performing the day-to-day operations of a typical government staff attorney; while the Chief Legal Counsel is charged with the managerial and supervisory responsibilities, as well as sharing a confidential position with the Commissioner and General Counsel." *Id.* at 6-7.

As such, the Board concluded that the position of RIDE Legal Counsel/Hearing Officer is not managerial and is not excluded from collective bargaining on that basis. *Id.* at 7.

F

The Second Appeal

On December 30, 2015, Appellant filed a Complaint renewing Appellant's appeal of the 2014 Decision and appealing the Board's 2015 Supplemental Decision. *See generally*, Compl. (2015 Compl.), Dec. 30, 2015. On January 26, 2015, the Union filed its Answer, and the Board subsequently filed its Answer. *See* PC-2015-5683 Docket. Thereafter, the parties exchanged briefs. *See generally*, RIDE's Mem. Supp. Appeal (RIDE's Mar. 2016 Mem.), Mar. 31, 2016; Br. of Resp't (Bd.'s Apr. 2016 Br.), Apr. 21, 2016; Def. Union Reply Mem., Apr. 21, 2016; RIDE's Resp. to Defs.' Reply (RIDE's May 2016 Resp.), May 5, 2016. Additionally, Appellant filed a motion to remand to allow it to submit additional evidence and a motion to consolidate their two appeals. (Mot. to Remand, Mar. 31, 2016; Mot. to Consolidate Cases for Decision, May 11, 2016.)

The Court granted Appellant's motion to consolidate, and additional briefs were submitted. *See* Order, Aug. 20, 2020 (McGuirl, J.); Order, Sept. 30, 2020 (McGuirl, J.); PC-2015-5683 Docket. Appellant argued that the Court should remand with specific instructions for the Board to consider additional evidence. (Pl.'s Mem. Pursuant to Ct.'s Order (RIDE's Nov. 2020 Mem.) 5-17, Nov. 2, 2020.) Specifically, Appellant requested that the case be remanded to the Board with instructions to consider evidence regarding: (1) the manner in which subsequently-hired RIDE Legal Counsel/Hearing Officers have performed the position; (2) retirement of former Chief Legal Counsel Attorney Muksian and the new duties of his replacement Attorney Cottone; and (3) the increased demands on the RIDE Legal Counsel/Hearing Officers due to the COVID-19 pandemic. *See* RIDE's Nov. 2020 Mem. 15. In response, the Board and the Union argued that pursuant to *Telemundo de Puerto Rico, Inc. v. NLRB*, 113 F.3d 270 (1st Cir. 1997), remand was inappropriate because the "additional evidence" that Appellant presented related to changes in job duties *subsequent to* the representation hearing, which was irrelevant to whether the RIDE Legal Counsel/Hearing Officers were confidential or managerial at the time the petition was filed. *See* Def. Union's Reply Mem. (Union's Dec. 2020 Reply) 2-3, Dec. 1, 2020; Mem. of Resp't in Resp. to Mot. to Remand (Bd.'s Oct. 2020 Mem.) 8-17, Oct. 31, 2020.

Thereafter, Margaret Santiago filed an affidavit indicating that the original, petitioning Legal Counsel/Hearing Officers were no longer employed by RIDE. *See generally*, Aff. of RIDE's Director of Human Resources Re the Legal Counsel/Hearing Officer Position, Oct. 1, 2021. On October 8, 2021, the Union filed a Motion to Correct the Record, and subsequently, Appellant filed its objection. (Union's Mot. to Correct Record 1, Oct. 8, 2021; RIDE's Obj. to Union's Mot. Correct Record 1, Oct. 15, 2021.)

G

October 2021 Decision

On October 25, 2021, the Court entered a decision remanding the matter to the Board. Decision 2, Oct. 25, 2021 (McGuirl, J.) (October 2021 Decision). In the October 2021 Decision, the Court noted that none of the original petitioning RIDE Legal Counsel/Hearing Officers were still employed by RIDE and that "there was some representation by counsel that none of the individuals currently holding this position may favor joining [the] [U]nion." (October 2021 Decision 8.) The Court further recognized that courts may decline to enforce orders of the Board if "'the passage of time leads to changed circumstances rendering enforcement . . . unfair, unnecessary, or otherwise inappropriate[.]'" *Id.* at 9 (quoting *NLRB v. International Brotherhood of Teamsters, Local 251*, 691 F.3d 49, 61 (1st Cir. 2012)). Accordingly, the Court questioned whether the case was ripe for adjudication and remanded to clarify whether the current status of the Legal Counsel/Hearing Officers "would render enforcement of the Board's order 'unfair, unnecessary, or otherwise inappropriate.'" *Id.* at 10 (quoting *International Brotherhood of Teamsters, Local 251*, 691 F.3d at 61).

H

The Board's 2021 Decision on Remand

On December 15, 2021, the Board issued a Decision on Remand (Board's 2021 Decision). *See* Board's 2021 Decision. After considering the facts in this matter and carefully reviewing its prior decisions, the Court's October 2021 Decision, the Act, and the Board's Rules and Regulations, the Board concluded that sufficient evidence and information existed for it to make its decision without additional hearings or evidence. *Id.* at 4.

The Board made eight findings of fact and one conclusion of law. *See id.* 8-9. The Board found that: (1) a petition for the investigation of controversies for representation was filed by the Union in November of 2012; (2) after RIDE objected to the petition, the Board conducted a hearing and issued a decision finding that RIDE Legal Counsel/Hearing Officers were not excludable from the bargaining unit; (3) the Union prevailed in the subsequent election and the Board certified the Union on May 28, 2014; (4) during RIDE's appeal, the parties agreed to stay the implementation of the Union's certification; (5) the Superior Court subsequently remanded the case to the Board to determine whether RIDE Legal Counsel/Hearing Officers were managerial; (6) the Board issued a Supplemental Decision and Order declining to reopen the record and finding that the position was not managerial and thus appropriately included in the bargaining unit; (7) RIDE appealed the 2015 Supplemental Decision and filed a second Motion to Remand to introduce new evidence; and (8) "[s]ince the filing of the original petition in November 2012 there has been a complete turnover of the employee complement in the Legal Counsel/Hearing Officer position." *See id.* 8-9. Accordingly, the Board concluded that:

> "The changed circumstances presented in the Remand Decision, i.e., the complete turnover of the employee complement occupying the Legal Counsel/Hearing Officer position, and the passage of time does not alter the Board's conviction and determination that the certification of the Union issued on May 28, 2014 should be enforced by the Superior Court." *Id.* at 9.

Neither party appealed this decision. *See* PC-2014-2730 Docket; PC-2015-5683 Docket.

I

Procedural History

After the Board's 2021 Decision, Appellant filed a motion to assign the consolidated cases for a decision. *See* Order, Apr. 5, 2022 (Rekas Sloan, J.). The motion was granted by this Court

on April 5, 2022. On August 3, 2022, the Court asked the parties to submit their briefs for the Court's consideration. Appellant submitted its March 2016 Memorandum of Law in Support of its Appeal, its May 2015 Response to Appellee's Reply Memoranda, November 2020 Memorandum Pursuant to the Court's August 20, 2020 Order, and its December 2020 Reply Memorandum Pursuant to the Court's August 20, 2020 Order. *See* RIDE's Mar. 2016 Mem.; RIDE's May 2016 Resp.; RIDE's Nov. 2020 Mem.; Pl.'s Reply Mem. Pursuant to Ct.'s Order (RIDE's Dec. 2020 Reply), Dec. 1, 2020. The Union submitted its November 2014 Memorandum of Law, its December 2014 Objection to Motion to Intervene and to Remand, its November 2020 Supplemental Memorandum, and its December 2020 Reply Memorandum. *See* Union's Nov. 2014 Mem.; Union's Dec. 2014 Obj.; Def. Union's Suppl. Mem. (Union's Nov. 2020 Suppl. Mem.), Nov. 1, 2020; Union's Dec. 2020 Reply. Finally, the Board submitted its April 2016 Brief, its October 2020 Memorandum of Law in Response and Objection to Motion to Remand, and its November Reply Memorandum of Law. *See* Bd.'s Apr. 2016 Br.; Bd.'s Oct. 2020 Mem. The Court now renders its decision.

II

Standard of Review

The Superior Court's review of an administrative decision is governed by § 42-35-15 of the Administrative Procedures Act (APA). *Rossi v. Employees' Retirement System*, 895 A.2d 106, 109 (R.I. 2006). Section 42-35-15(g) provides that:

> "The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings, or it may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
>
> "(1) In violation of constitutional or statutory provisions;
>
> "(2) In excess of the statutory authority of the agency;

> "(3) Made upon unlawful procedure;
> "(4) Affected by other error of law;
> "(5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
> "(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." Section 42-35-15(g)

The Superior Court's review of an administrative decision is limited to a determination of whether legally competent evidence exists in the record to support the agency's decision. *Johnston Ambulatory Surgical Associates, Ltd. v. Nolan*, 755 A.2d 799, 804-05 (R.I. 2000). Legally competent evidence, sometimes referred to as "substantial evidence," has been defined as "'relevant evidence that a reasonable mind might accept as adequate to support a conclusion[; it] means an amount more than a scintilla but less than a preponderance.'" *Center for Behavioral Health, Rhode Island, Inc. v. Barros*, 710 A.2d 680, 684 (R.I. 1998) (quoting *Newport Shipyard, Inc. v. Rhode Island Commission for Human Rights*, 484 A.2d 893, 897 (R.I. 1984)).

This Court cannot substitute its judgment on questions of fact for that of the agency. *Lemoine v. Department of Mental Health, Retardation and Hospitals*, 113 R.I. 285, 291, 320 A.2d 611, 614-15 (1974). This is so even in situations in which the court might be inclined to view the evidence differently and draw different inferences from those of the agency below. *Cahoone v. Board of Review of the Department of Employment Security*, 104 R.I. 503, 506, 246 A.2d 213, 214-15 (1968). "Questions of law, however, are not binding upon the court and may be reviewed to determine what the law is and its applicability to the facts." *Narragansett Wire Co. v. Norberg*, 118 R.I. 596, 607, 376 A.2d 1, 6 (1977).

III

Analysis

A

Scope of Review

Before examining each of Appellant's arguments in detail, this Court must delineate the appropriate scope of its analysis with regard to the parties' arguments and the evidence submitted to this Court. First, in the parties' submissions, each asserts several arguments that were heard and decided by this Court at an earlier stage of this proceeding. These findings will not be disturbed. *See Salvadore v. Major Electric & Supply, Inc.*, 469 A.2d 353, 355-56 (R.I. 1983). The law of the case doctrine provides that "ordinarily, after a judge has decided an interlocutory matter in a pending suit, a second judge, confronted at a later stage of the suit with the same question in the identical manner, should refrain from disturbing the first ruling[,]" unless the Court's prior ruling was "clearly erroneous." *Salvadore*, 469 A.2d at 355-56; *Chavers v. Fleet Bank (RI), N.A.*, 844 A.2d 666, 677 (R.I. 2004).

Here, neither party has argued that the Court's prior rulings on interlocutory matters were clearly erroneous. *See generally*, RIDE's Mar. 2016 Mem.; RIDE's May 2016 Resp.; RIDE's Nov. 2020 Mem.; RIDE's Dec. 2020 Reply; Union's Nov. 2014 Mem.; Union's Dec. 2014 Obj.; Union's Dec. 2020 Reply; Union's Nov. 2020 Suppl Mem.; Bd.'s Apr. 2016 Br.; Bd.'s Oct. 2020 Mem.; Bd.'s Nov. 2020 Reply. Therefore, this Court will not disturb the Court's prior rulings addressing: (1) whether Attorney Cottone has standing to intervene; (2) whether Appellant waived its argument that the Legal Counsel/Hearing Officers were managerial; and (3) whether the case should be remanded to consider additional evidence regarding the restructuring of RIDE, the increased demand on RIDE attorneys since the COVID-19 pandemic, and the manner in which

subsequent RIDE Legal Counsel/Hearing Officers perform their job duties.[6] *See Salvadore*, 469 A.2d at 355-56; *Chavers*, 844 A.2d at 677.

Second, this Court's review on appeal "shall be confined to the record." *See* § 42-35-15(f); *Davis v. Wood*, 444 A.2d 190, 192 (R.I. 1982). Therefore, although Appellant's arguments often reference the Affidavits of Attorney Abbott, Attorney Cottone, Attorney Sacks and Commissioner Infante Green, those affidavits are not before this Court for review and will not be considered because they are not part of the administrative record. *See* RIDE's Mar. 2016 Mem. Ex. D (Abbott's Aff.); RIDE's Nov. 2020 Mem. Ex. A (Chief Legal Counsel Cottone's Aff.), RIDE's Nov. 2020 Mem. Ex. B (Commissioner Infante Green's Aff.); RIDE's Nov. 2020 Mem. Ex. C (Sacks's Aff.); *see also Davis*, 444 A.2d at 192 (holding that the trial court did not err in excluding post-hearing evidence when hearing an APA appeal). However, for the purposes of reviewing the Board's 2015 Supplemental Decision, the Court will consider the parties' memoranda filed with the Superior Court up to December 2, 2015[7]—which includes reference to the affidavits of

[6] Each of these issues have been presented to this Court in an identical manner and addressed by this Court. *See* Order Granting Mot. to Intervene and Passing Mot. to Remand, Feb. 5, 2015 (Licht, J.); Order Granting Mot. to Remand, June 12, 2015 (Van Couyghen, J.); Decision, Oct. 25, 2021 (McGuirl, J.). The Union's argument regarding intervention was considered by Justice Licht on Attorney Cottone's motion to intervene, but the Motion was granted over the Union's objection. (Order Granting Mot. to Intervene and Passing Mot. to Remand 1, Feb. 5, 2015 (Licht, J.).) The Union's arguments regarding waiver and remand were considered by Justice Van Couyghen on RIDE and Attorney Cottone's Motion to Remand, but Justice Van Couyghen remanded the case to consider whether RIDE Legal Counsel/Hearing Officers were managerial, over the Union's objection. (Order Granting Mot. to Remand 1, June 12, 2015 (Van Couyghen, J.).) Finally, Appellant's arguments regarding remand to consider additional evidence were considered by Justice McGuirl who determined that "[a]s a general matter, this Court will not allow the presentation of evidence subsequent to the initial hearings conducted by the Board[,]" and declined to remand with the order to consider additional evidence. (Decision 6, 10, Oct. 25, 2021 (McGuirl, J.).)

[7] The parties' written memoranda filed with the Superior Court up to December 2, 2015 are: (1) RIDE's Mem. Supp. Mot. for Stay of Board's Decision Pending Appeal, July 8, 2014; (2) Obj. to Mot. for Stay, July 11, 2014; (3) RIDE's Mem. Supp. Appeal (RIDE's Sept. 2014 Mem.), Sept. 29, 2014; (4) Def. Union's Mem. of Law (Union's Nov. 2014 Mem.), Nov. 17, 2014; (5) Br. of

Attorney Cottone and Commissioner Gist—because the parties' "written arguments . . . that [were] filed in the Superior Court proceedings to date[,]" were incorporated by reference into the Supplemental Decision. (2015 Suppl. Decision 2.)

B

Rhode Island State Labor Relations Act

Under the Labor Relations Act, state employees have the right to organize and designate representatives of their own choosing for the purpose of collective bargaining. G.L. 1956 § 36-11-1(a). The Board is tasked with investigating questions or controversies concerning the representation of employees. *See* § 28-7-16(a). In a contested case, the Board must determine an appropriate bargaining unit. *See* Labor Relations Board 465 RICR 10-00-1.14(L). Further, the Board must determine which employees are excluded from collective bargaining based on their status as "managerial, supervisory, administrative, confidential, casual, and seasonal employees[.]" Labor Relations Board 465 RICR 10-00-1.14(J). The burden of proving that an employee qualifies as an excluded category falls upon the party asserting it. *See, e.g.*, Lee Modjeska et al., *Federal Labor Law: NLRB Practice* §§ 4.16-4.17 (2022); *see also DiGuilio v. Rhode Island Brotherhood of Correctional Officers*, 819 A.2d 1271, 1273 (R.I. 2003) (Rhode Island courts have consistently looked to federal law for guidance in labor law). If the Board finds

Resp't Board, Nov. 17, 2014; (6) RIDE's Reply Mem. Supp. Appeal, Dec. 15. 2014; (7) Obj. to Mot. to Intervene and Remand, Dec. 24, 2014; (8) Mot. to Enforce Consent Order, Dec. 24, 2014; (9) RIDE's Obj. to Mot. to Enforce Consent Order, Jan. 2, 2015; (10) Mem. Supp. Obj. to Mot. to Intervene and Remand, Jan. 4, 2015; (11) Movant's Reply to Objs. to Mot. to Intervene and Remand, Jan. 12, 2015; (11) Mem. Supp. Mot. to Remand, Jan. 23, 2015; (12) RIDE's Mem. Supp. Att'y Cottone's Mot. to Remand, Jan. 23, 2015; (13) Revised Mem. Supp. Obj. to Renewed Mot. to Remand, Jan. 30, 2015; (14) Resp. to Mots. to Remand, Jan. 30, 2015; (15) Suppl. Reply Mem. Supp. Mot. to Remand, Feb. 13, 2015.

the petitioning employees can be classified as an excluded category, the employees are excluded from the bargaining unit. *See* Labor Relations Board 465 RICR 10-00-1.14(J).

The Board's finding that an employee is confidential or managerial is a factual one, and it will be upheld as long as it is supported by legally competent evidence. *See Barrington School Committee*, 608 A.2d at 1138; *NLRB v. Lorimar Productions, Inc.*, 771 F.2d 1294, 1298 (9th Cir. 1985); *Woonsocket Housing v. Rhode Island State Labor Relations Board*, No. PC-93-0085, 1994 WL 930936, at *4 (R.I. Super. June 1, 1994); *NLRB v. Wolf Creek Nuclear Operating Corp.*, 762 F.App'x 461, 467-68 (10th Cir. 2019). Therefore, this Court may only reverse the Board's findings if they are "totally devoid of competent evidentiary support in the record." *See Milardo v. Coastal Resources Management Council of Rhode Island*, 434 A.2d 266, 272 (R.I. 1981).

1

Confidential Employees

Appellant argues that the Board's 2014 Decision should be reversed because the Board incorrectly found that RIDE Legal Counsel/Hearing Officers were not confidential. (RIDE's Mar. 2016 Mem. 7.) Appellant first contends that RIDE Legal Counsel/Hearing Officers assist and act in a confidential capacity to their supervising attorneys and independently have access to labor relations information at RIDE because their job description has always allowed them to perform labor relations work. *Id.* at 7-9. Appellant notes that Legal Counsel/Hearing Officers have been assigned labor relations matters involving RIDE employees after Attorney Muksian retired in 2016. *Id.* at 8-9. Therefore, because the RIDE Legal Counsel/Hearing Officer job description has not changed since the hearings, RIDE contends that RIDE Legal Counsel/Hearing Officers have always been able to perform labor relations work *Id.* at 9. Appellant argues that employees may be excludable based on their job duties, even if those job duties are not being actively performed.

(RIDE's May 2016 Resp. 2-3) (citing *Montgomery Ward & Co., Inc.*, 70 N.L.R.B. 1302 (1946)). Appellant contends that upholding the 2014 Decision would "inappropriately restrict RIDE's ability to continue to assign labor relations work to the Legal Counsel/Hearing Officers on a going-forward basis." (RIDE's Mar. 2016 Mem. 9-10.)

Appellant next argues that RIDE Legal Counsel/Hearing Officers assist and act in a confidential capacity to the Commissioner because they counsel the Commissioner relative to labor relations between RIDE and RIDE-operated schools: Davies, the Rhode Island School for the Deaf, and Central Falls. *Id.* at 10. Further, Appellant contends that RIDE Legal Counsel/Hearing Officers have access to confidential information related to labor relations with RIDE-operated schools because they: (1) act as hearing officers in Title 16 hearings related to teacher discipline, teacher termination, and teacher grievances; and (2) represent RIDE in revocation proceedings, teacher certification hearings, and teacher termination cases. *Id.* at 10-11.

Appellant further contends that the RIDE Legal Counsel/Hearing Officers' role as designee of the Commissioner in Title 16 hearings places them in a confidential capacity to the Commissioner because those hearings require them to communicate confidentially with the Commissioner about the validity of teacher terminations. *Id.* at 11-12. Appellant next argues that RIDE Legal Counsel/Hearing Officers act in a confidential capacity to the Commissioner and have access to confidential information because they represent RIDE in labor relations disputes involving the school districts and school unions. *Id.* at 12. Lastly, Appellant argues that RIDE Legal Counsel/Hearing Officers are entrusted with advance knowledge of RIDE's labor relations policies because they write advisory opinions and lobby on behalf of RIDE at the Legislature on issues affecting RIDE's labor relations with all schools. *Id.* at 13.

In response, the Union argues that the record below did not demonstrate that RIDE Legal Counsel/Hearing Officers independently have access to confidential information concerning labor relations within RIDE because the uncontroverted evidence showed that RIDE Legal Counsel/Hearing Officers do *not* have access to confidential information related to RIDE's collective bargaining. (Union's Nov. 2014 Mem. 2.) The Union further argues that there was no evidence before the Board to support Appellant's argument that Davies, the Rhode Island School for the Deaf, and Central Falls are RIDE operated schools. *Id.* at 3. Therefore, they argue that the Legal Counsel/Hearing Officer's role in hearing Title 16 appeals does not involve formulating labor relations for RIDE because they are deciding appeals involving non-RIDE employees. *Id.* at 3-4.

The Board argues that RIDE will not be forever restricted in its ability to assign work to its employees due to this Court's decision because if RIDE decides to start assigning its Legal Counsel/Hearing Officers labor relations work, then it can file a petition to exclude employees who they believe no longer belong to the bargaining unit. (Bd.'s April 2016 Br. 10-11.)

Confidential employees are not expressly excluded from collective bargaining under the Labor Relations Act. *Barrington School Committee,* 608 A.2d at 1135. Nevertheless, confidential employees may not engage in collective bargaining because:

> "It would be unfair for an employee who is entrusted with advance knowledge of his or her employer's labor relations policies to be able to share this information with a union that serves as that employee's collective bargaining representative. If a union were able to obtain such one-sided access to management's sensitive labor relations data, it would have a substantial and unwarranted advantage in its dealings with management." *Id.* at 1136.

Our Supreme Court has adopted the labor nexus test to determine whether an employee is confidential. *Board of Trustees, Robert H. Champlin Memorial Library v. Rhode Island State*

Labor Relations Board, 694 A.2d 1185, 1191 (R.I. 1997).[8] Under the labor nexus test, there are two categories of confidential employees who are excluded from collective bargaining. *Barrington School Committee*, 608 A.2d at 1136. The first category refers to employees "'who assist and act in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations.'" *Id.* (quoting *Hendricks County Rural Electric Membership Corp.*, 454 U.S. at 173). The second category consists of employees "who, in the course of their duties, 'regularly have access to confidential information concerning anticipated changes which may result from collective bargaining negotiations.'" *Barrington School Committee*, 608 A.2d at 1136 (quoting *Hendricks County Rural Electric Membership Corp.*, 454 U.S. at 189).

i

The First Category of Confidential Employees Under the Labor Nexus Test

To qualify as a confidential employee under the first category of the labor nexus test, two criteria must be met. *See Barrington School Committee*, 608 A.2d at 1136-37; *Board of Trustees, Robert H. Champlin Memorial Library*, 694 A.2d at 1191 (upholding the Board's conclusion that a secretary was not confidential because she did not "assist or act in a confidential capacity" to those who formulated, determined, and effectuated management policies). The "employee must assist and act in a confidential capacity with respect to a member of management; and . . . the employee's superior, with respect to whom such confidential relationship exists, must formulate, determine, and effectuate management policies in the field of labor relations." Annotation,

[8] While the *Barrington School Committee* Court only adopted the labor nexus test for the purposes of that particular case, *see Barrington School Committee v. Rhode Island State Labor Relations Board*, 608 A.2d 1126, 1137 (R.I. 1992), the *Board of Trustees, Robert H. Champlin Memorial Library* Court subsequently recognized the adoption of the labor nexus test. *Board of Trustees, Robert H. Champlin Memorial Library v. Rhode Island State Labor Relations Board*, 694 A.2d 1185, 1191 (R.I. 1997).

National Labor Relations Act: propriety of including, in bargaining unit, employees acting in confidential capacity or possessing confidential information, 23 A.L.R. Fed. 756 § 3 (1975). There is no express definition established by Rhode Island Courts with respect to "assist[ing] and act[ing] in a confidential capacity" to a supervisor. *See Barrington School Committee*, 608 A.2d at 1136. Notwithstanding, our Court has recognized that an employee is acting in a confidential capacity to a supervisor when they assist a managerial employee in a manner that exposes them to confidential information concerning labor relations. *Id.* at 1139. On the other hand, an employee who assists a managerial employee in a manner which exposes them to confidential information *unrelated* to labor relations is not a confidential employee. *See Hendricks County Rural Electric Membership Corp.*, 454 U.S. at 191-92; Stuart S. Mukamal & Jay E. Grenig, *Collective Bargaining: The Exclusion of "Confidential" and "Managerial" Employees*, 22 Deq. L. Rev. 1, 21 (1983) (emphasis added).

Regarding the second criteria, the "supervisor of the employee whose status is under consideration must have ongoing responsibility for developing labor policy." *Barrington School Committee*, 608 A.2d at 1136. Further, the supervisor must have some tangible influence in developing the employer's labor policy, rather than "merely implementing routine, day-to-day administrative decisions[.]" *Id.* If an employee assists and acts in a confidential capacity to an employee who does not have an ongoing responsibility for developing labor policy, then the employee is not confidential under the first category. *See Board of Trustees, Robert H. Champlin Memorial Library*, 694 A.2d at 1191.

Here, the Board concluded that although the Chief Legal Counsel, Attorney Muksian, was a managerial employee with the responsibility for developing labor policy, "[t]here was simply no evidence in the record to suggest that the Hearing Officers act in a confidential capacity to any

other employee of the department as it pertains to the formulation, determination or [implementation of] management policies in the field of labor relations." (2014 Decision 7-9.) The only evidence before the Board regarding the assistance that RIDE Legal Counsel/Hearing Officers provided to Attorney Muksian was: (1) that they would occasionally fill in for Attorney Muksian when he was away; and (2) that Attorney Pontarelli had one conversation with Attorney Muksian regarding the Board's rules and regulations. *See* May Tr. 20:20, 78:9-80:24; June Tr. 86:4-13. However, Attorney Pontarelli testified that during Attorney Muksian's absences, he has not performed any labor relations work on Attorney Muksian's behalf. (May Tr. 78:9-80:24; June Tr. 86:4-13.) Further, there was only one instance in which Attorney Pontarelli could recall Attorney Muksian consulting him on a labor relations matter. (May Tr. 20:20.) The "consultation" was a forty-five second conversation in which Attorney Muksian asked Attorney Pontarelli two general questions about the Board's rules and regulations. (May Tr. 21:3-21; June Tr. 87:5-13.) Accordingly, the Board's conclusion that RIDE Legal Counsel/Hearing Officers do not assist and act in a confidential capacity to Attorney Muksian was supported by legally competent evidence because the record was void of evidence that the Legal Counsel/Hearing Officers assisted Attorney Muksian in a manner which exposed them to confidential information concerning RIDE's labor relations. *See Barrington School Committee*, 608 A.2d at 1139; *Hendricks County Rural Electric Membership Corp.*, 454 U.S. at 191-92.

Furthermore, Appellant's argument that RIDE Legal Counsel/Hearing Officers are confidential employees because they assist and act in a confidential capacity to the Commissioner is unavailing because Appellant never established that the Commissioner had an "ongoing responsibility for developing labor policy." *See Barrington School Committee*, 608 A.2d at 1136. To qualify as the first category of confidential employee, the employee must satisfy *both* criteria.

See Barrington School Committee, 608 A.2d at 1136; *Board of Trustees, Robert H. Champlin Memorial Library*, 694 A.2d at 1191. The employee must assist and act in a confidential capacity to a supervisor and that supervisor must have some tangible influence in developing the employer's labor policy. *See Barrington School Committee*, 608 A.2d at 1136; *Board of Trustees, Robert H. Champlin Memorial Library*, 694 A.2d at 1191. Although Attorney Pontarelli testified that the Commissioner was a member of management, there was no testimony regarding the Commissioner's influence in developing RIDE labor policy. *See* May Tr. 41:11-24. Therefore, RIDE Legal Counsel/Hearing Officers cannot be classified as the first category of confidential employee based on the assistance that they provide to the Commissioner. *See Barrington School Committee*, 608 A.2d at 1136; *Board of Trustees, Robert H. Champlin Memorial Library*, 694 A.2d at 1191.

ii

The Second Category of Confidential Employees Under the Labor Nexus Test

To qualify as the second category of confidential employee, the employee must have access to confidential information which "directly implicate[s] labor functions such as collective bargaining and grievance processing." 1 Modjeska, et al., *Federal Labor Law: NLRB Practice* § 4:16 (2023). Further, "[c]asual access to labor-related information is not enough to disqualify an employee from belonging to a bargaining unit." *Barrington School Committee*, 608 A.2d at 1137. Instead, the employee must have regular and considerable access to confidential labor relations material. *Id.* Access to such material on an overflow or occasional basis is not sufficient. *Id.*

Here, the Board concluded that RIDE Legal Counsel/Hearing Officers do not qualify as confidential employees under the second category of the labor nexus test because they do not have "'regular and considerable access to such confidential information as a result of [their] job duties.'"

(2014 Decision 10) (quoting *Barrington School Committee*, 608 A.2d at 1137). At the hearing, Attorney Pontarelli acknowledged that nothing in the Legal Counsel/Hearing Officer job description precludes them from being assigned labor relations matters. (May Tr. 32:12-33:7.) However, he further testified that he had not been assigned a case involving labor relations with either of the two unions that represent RIDE employees since the 1990s. *See id.* at 23:12-17, 34:8-12. Attorney Pontarelli's testimony was supported by Ms. Santiago who testified that when she works on labor relations matters, she consults with RIDE's Chief Legal Counsel, not the three RIDE Legal Counsel/Hearing Officers. (May Tr. 8:21-9:25.) She testified that when RIDE engages in collective bargaining, the Chief Legal Counsel and the General Counsel assist her in contract negotiations. *Id.* at 11:9-12:4. She confirmed that the Legal Counsel/Hearing Officers are not involved and that no one outside of the negotiation team has access to RIDE's collective bargaining proposals and strategies. *Id.* at 12:16-24.

Accordingly, there was legally competent evidence to support the Board's conclusion that RIDE Legal Counsel/Hearing Officers do not qualify as the second category of confidential employee because the testimony revealed that RIDE Legal Counsel/Hearing Officers do not have "regular and considerable" access to information concerning RIDE's labor relations such as employee grievance information or collective bargaining information. *See Barrington School Committee*, 608 A.2d at 1137; *Modjeska*, *supra*, § 4:16. While it is clear that RIDE Legal Counsel/Hearing Officers *used to* have access to such confidential information, their access could no longer be considered "regular and considerable" because all access ceased when RIDE Legal Counsel/Hearing Officers stopped conducting RIDE employee grievance hearings in the 1990s. *See Barrington School Committee*, 608 A.2d at 1137; June Tr. 85:15, 86:3.

Appellant nevertheless argues that RIDE Legal Counsel/Hearing Officers are confidential because they still have the *ability* to conduct RIDE grievance hearings under their job description, and thus they still have the ability to access confidential information concerning labor relations. (RIDE's Mar. 2016 Mem. 8-9.) Other states follow the authorized access test whereby an employee will qualify as confidential as long as they have the authority to access information concerning the collective bargaining process between labor and management. *See Department of Central Management Services/Department of State Police v. Illinois Labor Relations Board*, 980 N.E.2d 1259, 1267 (Ill. App. Ct. 2012). However, our Supreme Court has been clear that "[c]asual access to labor-related information is not enough to disqualify an employee from belonging to a bargaining unit . . . , [so] the mere typing of or handling of confidential labor relations material does not, without more, imply confidential status." *Barrington School Committee*, 608 A.2d at 1137. Furthermore, Rhode Island courts look to federal courts for assistance in resolving state labor issues, *see DiGuilio*, 819 A.2d at 1273, and under federal law "[m]ere access to confidential material, albeit confidential labor relations material, is not sufficient to confer confidential status."[9] *Greyhound Lines, Inc.*, 257 N.L.R.B. 477, 480 (1981). Accordingly, the fact that RIDE Legal Counsel/Hearing Officers still have the authority under their job description to conduct grievance hearings for RIDE employees does not confer confidential status. *See Barrington School Committee*, 608 A.2d at 1137; *Greyhound Lines, Inc.*, 257 N.L.R.B. at 480.

[9] Appellant's reliance on *Montgomery Ward & Co., Inc.* to support their argument that mere access is enough is unavailing because *Montgomery Ward & Co., Inc.* involved supervisory personnel rather than confidential personnel. *Montgomery Ward & Co., Inc.*, 70 N.L.R.B. 1302, 1304 & n.4 (1946). Unlike supervisory personnel who are excluded from collective bargaining because of their *authority* to make personnel decisions, *see State v. Local No. 2883, American Federation of State, County and Municipal Employees*, 463 A.2d 186, 189 n.4 (R.I. 1983), confidential employees are only excluded based on their *actual* access to their employer's "sensitive labor relations data." *See Barrington School Committee*, 608 A.2d at 1136.

Furthermore, Appellant's argument that RIDE Legal Counsel/Hearing Officers have regular access to confidential information due to their work involving the labor relations of teachers is unavailing because Appellant did not establish that the teachers at Central Falls, the Rhode Island School for the Deaf, and Davies are RIDE employees. *See Kaplan, Sicking, Hessen, Etc.*, 250 N.L.R.B. 483, 486 (1980). Confidential employees must have access to confidential information concerning the labor relations of "their *own* employer, not some other employer." *See id.* at 485 (emphasis added); *Kleinberg, Kaplan, Wolff, Cohen & Burrows*, 253 N.L.R.B. 450, 457 (1980). Appellant *alleged* that Central Falls, the Rhode Island School for the Deaf, and Davies are RIDE-operated schools. *See* RIDE's Mar. 2016 Mem. 10; 2014 Compl. ¶¶ 12-16; 2015 Compl. ¶¶ 12-16. However, the record is void of evidence to show that the teachers at these schools are RIDE employees. To the contrary, the testimony before the Board established that Central Falls, the Rhode Island School for the Deaf, and Davies were *not* operated by RIDE. (May Tr. 26:18-22.)

Although RIDE argued to the *Board* that the three schools were operated by RIDE as a matter of law, they have presented no such argument before this Court. *See generally*, RIDE's Mar. 2016 Mem.; RIDE's May 2016 Resp.; RIDE's Nov. 2020 Mem.; RIDE's Dec. 2020 Reply. Instead, they have simply stated, without support in the law or the record, that these schools are "under the control of RIDE" or are "RIDE-operated." (RIDE's Mar. 2016 Mem. 10-11.) Therefore, without a meaningful discussion or legal briefing on this issue, this Court must consider RIDE's argument that these schools are operated by RIDE as a matter of law waived. *See Wilkinson v. State Crime Laboratory Commission*, 788 A.2d 1129, 1131 n.1 (R.I. 2002). Consequently, there is no evidence to show that RIDE Legal Counsel/Hearing Officers gain access to confidential labor relations information by virtue of their participation in teacher discipline or

grievance hearings. *See Kaplan, Sicking, Hessen, Etc.*, 250 N.L.R.B. at 486; *Kleinberg, Kaplan, Wolff, Cohen & Burrows*, 253 N.L.R.B. at 457. Lastly, affirming the Board's 2014 Decision will not restrict Appellant's ability to assign its Legal Counsel/Hearing Officers labor relations work going forward because Appellant may petition the Board to exclude RIDE Legal Counsel/Hearing Officers from the bargaining unit on the basis that their changed duties render them confidential. *See* Labor Relations Board 465 RICR 10-00-1.17(D). Accordingly, this Court concludes that the Board's finding that the RIDE Legal Counsel/Hearing Officers were not confidential employees was supported by legally competent evidence and thus affirms the 2014 Decision of the Board.

2

Managerial Employees

Appellant argues that the 2015 Supplemental Decision should be reversed because the Board's conclusion that RIDE Legal Counsel/Hearing Officers were not managerial was clearly erroneous and because the Board abused its discretion in refusing to reopen the record. (RIDE's Mar. 2016 Mem. 18-19; RIDE's Nov. 2020 Mem. 9-10.) First, Appellant argues that RIDE Legal Counsel/Hearing Officers are managerial because they formulate and effectuate RIDE policies by issuing decisions and orders on behalf of the Commissioner. (RIDE's Mar. 2016 Mem. 15-17; RIDE's May 2016 Resp. 3-5.) Specifically, Appellant argues that RIDE Legal Counsel/Hearing Officers have statutory authority to issue decisions to the Commissioner regarding any education law related dispute. (RIDE's May 2016 Resp. 4) (citing to G.L. 1956 § 16-39-1). Further, Appellant argues that the decisions issued by RIDE Legal Counsel/Hearing Officers can set forth RIDE's official interpretation of laws relating to education. *See id.*

Appellant next argues that the Board erred by improperly distinguishing *American Federation of State*. (RIDE's Mar. 2016 Mem. 17.) Finally, Appellant contends that the Board

erroneously based its decision on the lack of evidence in the record to support a finding that RIDE Legal Counsel/Hearing Officers were managerial while simultaneously declining to give Appellant an opportunity to present additional evidence. *Id.* at 17-19. Appellant contends that the Board erred in refusing to consider additional evidence on the issue of managerial employees because it failed to consider "whether the additional evidence was material, whether the motion had been timely made, or whether there had been 'reasonable grounds for failure to adduce such evidence at the hearing[,]'" in accordance with Rule 1.8(K) of the Board. (RIDE's Nov. 2020 Mem. 9) (quoting Labor Relations Board 465 RICR 10-00-1.8(K)).

In response, the Union argues that the *American Federation of State* decision is distinguishable because the testimony in that case revealed that the employees were the main avenue through which their employer enforced Illinois law related to public utilities. (Union's Nov. 2014 Mem. 5-6.) The Union further argues that the Board properly concluded that the additional evidence that Appellant sought to introduce was not admissible because it related to changes in the RIDE Legal Counsel/Hearing Officer's job description *after* the hearing was complete. (Union's Nov. 2020 Suppl. Mem. 2-3.)

The Board argues that RIDE Legal Counsel/Hearing Officers are not managerial because there was no evidence in the record to show that RIDE Legal Counsel/Hearing Officers are responsible for "drafting policies, effectuating policies, developing a budget, or assuring that the department or agency runs effectively." (Bd.'s Apr. 2016 Br. 13-14.) The Board further argues that the Board did not err in refusing to reopen the record because the additional evidence offered by Appellant related post-hearing changes in the RIDE Legal Counsel/Hearing Officers' job duties which were irrelevant to the issue before the Board. *Id.* at 10-11. Furthermore, the Board contends that the Board did not err in relying on the lack of evidence in the record to reach its decision

because Appellant "had a full and fair opportunity to elucidate whatever testimony it wanted at the two formal hearings." *Id.* at 15.

Managerial employees are not statutorily excluded from collective bargaining. *See* §§ 28-7-12, 28-9.4-2, 36-11-1. However, our Supreme Court has established an implied exclusion from the Labor Relations Act for managerial employees. *See Local No. 2883, American Federation of State, County and Municipal Employees*, 463 A.2d at 189-90 (citing *National Labor Relations Board v. Bell Aerospace Co., Division of Textron, Inc.*, 416 U.S. 267, 274 (1974)). Managerial employees are excluded from collective bargaining because managerial employees carry out and help formulate the employer's policies. *See id.* at 191. Therefore, to allow managerial employees to be union members would create a conflict of interest between their allegiance to management and to their co-workers. Robert J. Nobile, *Human Resources Guide* § 8:9 (2023).

Managerial employees are those "who formulate and effectuate management policies by expressing and making operative the decisions of their employers. Such employees must exercise discretion within, or even independently of, established employer policy and must be aligned with management." *Fraternal Order of Police, Westerly Lodge No. 10*, 659 A.2d at 1108 (internal citations omitted) (quoting *Yeshiva University*, 444 U.S. at 682-83). "[N]ormally an employee may be excluded as managerial only if he represents management interests by taking or recommending discretionary actions that effectively control or implement employer policy." *Yeshiva University*, 444 U.S. at 683. Nevertheless, managerial employees should not be confused with professional employees such as doctors, lawyers, or engineers, who are generally included in collective bargaining units. Robert J. Nobile, *Human Resources Guide* § 8:9 (2023); *see also Connecticut Humane Society and International Association of Machinists & Aerospace Workers, AFL-CIO, District Lodge 26*, 358 N.L.R.B. 187, 209 (2012). Professional employees are not

"aligned with management" if their discretionary decision-making is limited to the type routinely discharged by similarly situated professionals. *Yeshiva University*, 444 U.S. at 690. In contrast, "an individual who exercises managerial authority *in addition to* regular professional activities is a managerial employee excluded from the statute's coverage." Nobile, *Human Resources Guide*, § 8:9. Accordingly, an attorney is not a managerial employee simply because they shape their employer's policy in the area of the attorney's expertise if there is no evidence that the attorney has the independent authority to formulate, determine, and effectuate management policies with respect to labor relations. *See Ohio State Legal Services Association*, 239 N.L.R.B. 594, 598 (1978).

Here, the Board concluded that RIDE Legal Counsel/Hearing Officers were not managerial because they perform "the day-to-day operations of a typical government staff attorney; while the Chief Legal Counsel is charged with the managerial and supervisory responsibilities[.]" (2015 Suppl. Decision 7.) The testimony revealed that RIDE Legal Counsel/Hearing Officers write opinions for the Commissioner on a variety of topics; however, when acting as a hearing officer, Attorney Murray testified that she is tasked with determining whether a school's action is within the legal mandate, not within RIDE's management policy. (May Tr. 28:17-29:3; June Tr. 103:19-104:8.) Further Attorney Murray testified that she does not consult with the Commissioner when she decides a teacher discipline case. (June Tr. 98:20-99:10.) Instead, she decides cases based only on the record created in the hearing and the law applied. *Id.* Further, while Attorney Pontarelli testified that RIDE Legal Counsel/Hearing Officers write advisory opinions for the Commissioner, these opinions are not binding. (May Tr. 56:25-57:23.) Finally, it is the Chief Legal Counsel, not the Legal Counsel/Hearing Officer, who is tasked with overseeing the work of the staff attorneys and advocating for changes to policy. *See* RIDE's Ex. 2.

Accordingly, the Board's conclusion was supported by legally competent evidence because the evidence revealed that RIDE Legal Counsel/Hearing Officers' discretionary decision-making is limited to applying the law to the facts of each case in a manner that is typical of a government staff attorney. *See Yeshiva University*, 444 U.S. at 690; *Ohio State Legal Services Association*, 239 N.L.R.B. at 598. While the RIDE Legal Counsel/Hearing Officers' decision-making may influence RIDE's overall policy, "managerial authority is not vested in employees merely because their work performance may influence an employer's direction." *See Ohio State Legal Services Association*, 239 N.L.R.B. at 598. While Appellant *argues* that the decisions of the RIDE Legal Counsel/Hearing Officers set forth RIDE's official interpretation of laws relating to education, it presented no evidence to support this argument below. *See generally*, May Tr.; June Tr. Therefore, without evidence to show that RIDE Legal Counsel/Hearing Officers have independent authority to formulate, determine, and effectuate RIDE management policies with respect to labor relations, the Board did not err by concluding that RIDE Legal Counsel/Hearing Officers were not managerial. *See id.*; *Yeshiva University*, 444 U.S. at 690; *see also Fraternal Order of Police, Westerly Lodge No. 10*, 659 A.2d at 1108 (adopting the *Yeshiva University* Court's definition of managerial employees and noting that our Supreme Court looks to federal labor practices for guidance). Appellant's argument that the Board erred by improperly distinguishing *American Federation of State* does not persuade a contrary result because the *American Federation of State* decision relies on the Illinois definition for managerial employees, which is different from the Rhode Island definition. *Compare* 5 Ill. Comp. Stat. 315/3, *with Fraternal Order of Police, Westerly Lodge No. 10*, 659 A.2d at 1108.

Furthermore, contrary to Appellant's argument, the Board did not abuse its discretion in refusing to reopen the record. The Court reviews the Board's denial of a motion to reopen the

record for abuse of discretion. *RAV Truck and Trailer Repairs, Inc. v. National Labor Relations Board*, 997 F.3d 314, 324 (D.C. Cir. 2021); *see also DiGuilio*, 819 A.2d at 1273 (Rhode Island courts have consistently looked to federal law for guidance in labor law). Therefore, this Court will not overturn the Board's decision "'unless it clearly appear[s] that the new evidence would compel or persuade to a contrary result.'" *See RAV Truck and Trailer Repairs, Inc.*, 997 F.3d at 324 (quoting *Reno Hilton Resorts v. NLRB*, 196 F.3d 1275, 1285 n.10 (D.C. Cir. 1999).

The "new" evidence proffered by the Appellant consisted of Attorney Cottone and Commissioner Gist's affidavits. *See* 2015 Suppl. Decision 2 & n.1; RIDE's Mem. Supp. Att'y Cottone's Mot. to Remand 4-5, Jan. 23, 2015. Most of this evidence related to how Attorney Cottone performed the position and how Commissioner Gist utilized Attorney Cottone *after* the hearing closed. *See* RIDE's Mem. Supp. Att'y Cottone's Mot. to Remand 4-5; Mem. Supp. Mot. to Remand (Att'y Cottone Mem. Supp. Mot. to Remand) 9-13, 30-31, Jan. 23, 2015. This evidence would not have compelled or persuaded a contrary result because evidence that pertains to events occurring "during the posthearing period" is not relevant to the issues decided during the hearing. *See Davis*, 444 A.2d at 192. Additionally, Attorney Cottone's evidence regarding Attorney Pontarelli and Attorney Murray's history of filing and withdrawing complaints of unfair labor practice charges also does not compel a contrary result because it only relates to Attorney Pontarelli and Attorney Murray's credibility. (Att'y Cottone's Mem. Supp. Mot. to Remand 2-3.)

Finally, contrary to Appellant's argument that the Board erred by failing to consider the factors under Rule 1.8(K) for reopening the record, Rule 1.8(K) governs motions for leave to reopen a hearing due to newly discovered evidence, and Appellant never filed a motion for leave to reopen the hearing before the Board. *See* Labor Relations Board 465 RICR 10-00-1.8(K); 2015 Suppl. Decision 1-7; Stipulation ¶¶ 1-3, Feb. 15, 2023. Therefore, the Board was not required to

undergo the analysis outlined in Rule 1.8(K). *See* Labor Relations Board 465 RICR 10-00-1.8(K). As such, the Board did not abuse its discretion in refusing to reopen the record and there was legally competent evidence on the record to support the Board's conclusion that RIDE Legal Counsel/Hearing Officers were not managerial.

C

Attorney Cottone's Exclusion from the Election

Lastly, Appellant argues that this Court should reverse the 2014 Decision and the 2015 Supplemental Decision because the Board erred by improperly excluding Attorney Cottone from the secret ballot election. (RIDE's Mar. 2016 Mem. 19.) They contend that, under federal precedent, all employees who were employed during the payroll period preceding the date of the election are eligible to vote. *Id.* Even assuming that Attorney Cottone was improperly excluded from the election, reversal is still not warranted. *See* § 42-35-15(g).

When an agency's error does not prejudice the appellant, the error is harmless and does not merit reversal. *See Robert Derecktor of Rhode Island, Inc. v. Employment Security Board of Review Department of Employment Security*, 572 A.2d 58, 61 (R.I. 1990); *see also Woonsocket Housing Authority v. Rhode Island State Labor Relations Board*, No. PC-93-0085, 1994 WL 930936, at *4 (R.I. Super. June 1, 1994) ("[Section] 42-35-15(g) has a built-in harmless error rule[.]"). Only two employees voted in the secret election, and both employees voted in favor of the Union. *See* Report Upon Secret Ballot 1. Therefore, even if Attorney Cottone had been included in the bargaining unit, the majority of the total unit votes would still be in favor of the Union. *See id.*; *see also* Labor Relations Board 465 RICR 10-00-1.13(H)(1)(4) (for a newly created union, the votes must be 51 percent out of the total unit in favor of the union). As such, any error

committed by the Board was harmless and reversal is not warranted. *See Robert Derecktor of Rhode Island, Inc.*, 572 A.2d at 61.

IV

Conclusion

For the foregoing reasons, the Court affirms the 2014 Decision and the 2015 Supplemental Decision of the Rhode Island State Labor Relations Board.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	**R.I. Board of Regents/Department of Education v. R.I. State Labor Relations Board, et al.** ***Consolidated with*** **R.I. Board of Regents/Department of Education v. R.I. State Labor Relations Board, et al.**
CASE NOS:	**PC-2015-5683 *consolidated with* PC-2014-2730**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**June 29, 2023**
JUSTICE/MAGISTRATE:	**Taft-Carter, J.**
ATTORNEYS:	
For Plaintiff:	**Joseph D. Whelan, Esq.** **Matthew H. Parker, Esq.**
For Defendant:	**Jeffrey W. Kasle, Esq.** **Paul Pontarelli, Esq.**